

United States Court of Appeals
For the Ninth Circuit

SAFEWAY STORES, INCORPORATED, *Petitioner*,

vs.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR REHEARING OF
PETITIONER SAFEWAY STORES, INCORPORATED

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No. 19325

PETITION FOR REHEARING OF
PETITIONER SAFEWAY STORES, INCORPORATED

Petitioner respectfully petitions the Court for a rehearing and reconsideration of its decision filed herein on September 14, 1966, and requests that this case be reheard en banc for the reasons set forth below:

I.

Assuming (a) that the record before the Commission permitted a finding of participation in a price fixing conspiracy by members of Bakers of Washington, Inc. and by petitioners other than Safeway; assuming (b) that the record warrants the finding that Bakers' secretary participated in conspiratorial price fixing activities on behalf of members of Bakers; and assuming (c) that "the existence of the [Safeway] price differential did not compel the Commission to find that Safeway was not a conspira-

tor" (Opinion, page 8), the Court erred in sustaining the finding of the Commission that Safeway participated in the conspiracy for the following reasons:

1. The Court concludes (Opinion, page 9) "that there was substantial evidence to support findings that each of the petitioners [including Safeway] participated".

2. The evidence of record — and the only facts referred to by the Court — upon which a finding of participation by Safeway can be predicated are: "the record reveals that Safeway directly paid to Bakers' secretary the sum of \$600 per year, an amount equivalent to the maximum dues charged for Bakers' members". The only evidence of record affirmatively establishes that this payment was paid for representation of Safeway in its labor matters (Tr. 120). This evidence of record is not contradicted — it is not simply a "claim" by Safeway.

3. The Court's conclusion "that there was evidence which, with its inferences, was sufficiently substantial to support a determination" that Safeway participated in conspiratorial activity is erroneous as a matter of law:

(a) The total evidence referred to in paragraph 2 above does not support such a determination.

(b) There are no permissible inferences which may be drawn from such evidence that support a determination of conspiratorial participation by Safeway.

4. The Court's observation that "while Safeway claimed that the consideration was the secretary's individual rep-

resentation in its labor matters, the Commission was free to infer otherwise" is erroneous as a matter of law:

(a) The only evidence of record, which is not contradicted, is that Safeway's payment was made exclusively for work on labor matters. (Tr. 120)

(b) The participation by Bakers' secretary in conspiratorial price fixing activities on behalf of members of Bakers does not permit the drawing of an inference that Safeway paid for or authorized conspiratorial price fixing activities on its behalf. (See Tr. 98, 119)

5. Safeway is entitled to a determination as to its participation in conspiratorial activity based upon the factual record before the Commission — not upon the freedom of the Commission to draw inferences as to Safeway's participation which do not find support in the facts of record.

II.

Petitioner cannot be deemed to have waived the failure of the Commission to observe due process in the purported process of taking official notice of facts assertedly established in another proceeding, Docket No. 7630.

(a) Assuming that petitioner may be deemed to have waived objections to a failure of the Commission to follow the statutory requirements of Section 7(c) and 7(d) of the Administrative Procedure Act, 5 U.S.C. § 1006(c), (d) as stated by the Court (Opinion p. 11), this petitioner cannot be deemed to have waived failure to ac-

cord to it due process in the determination which resulted in the order against it. For reasons set forth at pages 33-40 of this petitioner's brief herein, this denial of due process cannot be obviated by reference to Section 1006(d) of the Administrative Procedure Act and its provisions for affording petitioner the opportunity of showing the contrary of the noticed facts. Failure to accord petitioner procedural due process under the 4th Amendment is not subject to waiver.

(b) A holding to the contrary is squarely contradictory of the decision of the Court of Appeals for the Sixth Circuit in *Dayco Corp. vs. Federal Trade Commission*, decided June 17, 1966, 362 F(2d) 180, where this precise point was ruled upon and where the Court observed with respect to the use of official notice: "due process must be observed in such use". (362 F(2d) at 185. The fact that the petitioner there "declined to put in any evidence in an attempt to disprove the case the F.T.C. had made" by use of official notice was deemed to be immaterial. (362 F(2d) at 185).

III.

Petitioner, Safeway Stores, Incorporated, adopts and incorporates by this reference the petition for rehearing filed herein on behalf of petitioner Continental Baking Company.

Respectfully submitted,

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Safeway Stores, Incorporated

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CERTIFICATE

I certify that, in connection with the preparation of this petition, I have examined Rules 18, 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those rules. I further certify that in my judgment this petition is well founded and that it is not interposed for delay.

ROBERT W. GRAHAM
GEORGE CONSTABLE
Attorney

October 10, 1966

